# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-473

PAUL J. MAHONEY, PETITIONER

*v.*

JAMES D. HODGSON, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 13–16) is reported at 460 F. 2d 326. The contempt orders and partial judgment of the district court (Pet. App. 19–24) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 5, 1972. A timely petition for rehearing was denied on June 22, 1972 (Pet. App. 17). The petition for a writ of certiorari was filed on September 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



488-369—72

## QUESTIONS PRESENTED

1. Whether the district court properly entered a partial default judgment against petitioner after he willfully and persistently refused to comply with the court's discovery order.

2. Whether petitioner's attempt to appeal from a civil contempt order divested the district court of jurisdiction to impose additional remedies for petitioner's continued failure to comply with the court's prior orders.

3. Whether the district court's imposition of remedies for civil contempt was procedurally defective.

4. Whether the district court properly awarded attorney's fees to the Secretary under Rule 37(b)(2)(E), Fed. R. Civ. P.

## STATUTES INVOLVED

. The pertinent provisions of the Federal Rules of Civil Procedure are set forth in the petition (Pet. App. 24–27).

## STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 217) to enjoin petitioner from violating the Act's minimum wage, overtime, and record keeping provisions, and from continuing to withhold unpaid wages due his employees (A. 5–6).[1] Petitioner refused to answer interrogatories requesting information from payroll and related business records, and filed interrogatories himself to which the Secretary objected.

[1] "A." references are to the appendix filed in the court of appeals.

Petitioner thereupon moved to compel the Secretary to answer. On June 25, 1971, the district court sustained the Secretary's objections, and ordered petitioner either to answer the interrogatories or to permit review of the relevant business records pursuant to Rule 33(c), Fed. R. Civ. P. (A. 23). Petitioner did not comply. Consequently, after a hearing in which petitioner was represented by counsel, the district court on November 30, 1971, held petitioner in contempt of the June 25 order, awarded expenses and attorney's fees to the Secretary, and fined petitioner $100 for each day after December 6 that he remained in contempt.

Petitioner still refused to produce the records, and on January 6, 1972, filed a notice of appeal from the November 30 order and requested a stay pending appeal. A further hearing was held on January 14, 1972, the stay was denied, and the court: (1) entered a partial default judgment against petitioner, enjoining further violations of the Fair Labor Standards Act;[1] (2) fined petitioner $3,800 for his contempt to date; and (3) ordered petitioner incarcerated "until such time as he arranges * * * for the delivery * * * of [those] records, which are within his immediate custody and control, which can be readily produced, and which he through his lawyer has contemptuously refused to produce despite repeated orders, both formal and informal, by the Court" (A. 92). The court stayed the execution of the fine and

[1] The court declined to restrain the continued withholding of unpaid wages, since the wages due could not be ascertained without the records in issue (A. 91-92).

commitment for ten days. Petitioner filed a second notice of appeal, and applied to the court of appeals for a stay of the November 30 and January 14 orders pending final disposition of the appeals (A. 3). When the stay was denied on January 21, 1972, petitioner paid the fine and produced the records.

The court of appeals affirmed *per curiam*. It held that the June 25 discovery order was authorized by Rule 37(a), Fed. R. Civ. P., was not unduly burdensome, and did not violate petitioner's privilege against self incrimination. The court rejected petitioner's contention that the November 30 order was procedurally defective, pointing out that petitioner had notice and was heard through his attorney. It held that the award of attorney's fees violated no constitutional right of petitioner. Finally, the court held that petitioner's attempt to appeal from the November 30 civil contempt order, "obviously a nonappealable interlocutory order" (Pet. App. 16), did not divest the district court of jurisdiction to enter the January 14 order, and that the partial default judgment was not overly harsh (Pet. App. 13–16).

## ARGUMENT

Petitioner urges in this Court that the orders of the district court adjudging him in contempt, entering a default judgment against him, and ordering his incarceration violated due process, that the district court was without jurisdiction to enter the January 14 order after an appeal from its November 30 order had been filed, and that the award of attorney's fees to the government deprives him of property without due process

because such costs cannot be assessed against the government. These contentions were considered and rejected by the court below, in an opinion on which we rely. Contrary to petitioner's assertions, there is no conflict among the circuits on any of the questions presented. Further review by this Court is not warranted.

1. Petitioner's contention that the trial court's entry of a partial default judgment violates due process and conflicts with numerous decisions of the Fifth and Second Circuits is without merit. In the decisions cited by petitioner, the person to whom the discovery order was directed was unable to comply (Pet. 5–6). It is well settled, however, that the sanctions provided by Rule 37(b)(2)(C), Fed. R. Civ. P., including the entry of a default judgment, should be imposed where, as here, the information sought is readily available and the party has repeatedly refused to produce it. See, *e.g.*, *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, 347, 351–352; *Jones* v. *Uris Sales Corp.*, 373 F. 2d 644 (C.A. 2); *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d 1118, 1126–1127 (C.A. 5), certiorari denied *sub nom. Trefina* v. *United States*, 400 U.S. 878.

Moreover, the default judgment here was limited to an injunction against future violations, which, as was pointed out in *Mitchell* v. *Pidcock*, 299 F. 2d 281, 287 (C.A. 5), "subjects the [petitioner] to no penalty, to no hardship," but "requires the [petitioner] to do what the Act requires anyway—to comply with the law."

2. The court below correctly held that petitioner's attempt to appeal the first contempt order did not divest the district court of jurisdiction to impose additional sanctions for failure to comply with its orders. It is clear that the November 30 order imposed remedies for civil contempt, and was therefore not an appealable final judgment.[3] *Fox* v. *Capital Co.*, 299 U.S. 105, 107. See also *Fireman's Fund Insurance Co.* v. *Myers*, 439 F.2d 834, 837–838 (C.A. 3).

The attempted appeal, therefore, was correctly disregarded by the district court. *Ruby* v. *Secretary of the United States Navy*, 365 F.2d 385, 389 (C.A. 9), certiorari denied, 386 U.S. 1011. The cases cited by petitioner do not indicate that there is a conflict among the circuits on this issue. In *United States* v. *Hemphill*, 369 F.2d 539 (C.A. 4), the very fact that "the contempt citation itself is not an appealable order" (*id.* at 543) led the court to conclude that mandamus would lie when the underlying order is clearly erroneous. The court carefully noted, however, that mandamus is not available when the underlying order is within the range of the discretion vested in the district judge (*id.* at 544, n. 7). *Keohane* v. *Swarco, Inc.*, 320 F.2d 429 (C.A. 6), involved an apparently premature appeal, followed by the district court's dismissal of a motion to amend. The court of appeals

[3] Petitioner incorrectly suggests that the imposition of a fine rendered the November 30 order one for criminal contempt (Pet. 6–7). The fine, however, could have been entirely avoided by reasonably prompt compliance even at that date; it was thus "intended to be remedial by coercing [petitioner] to do what he had refused to do" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 442).

held, however, that it had jurisdiction of the appeal, and that the district court's dismissal was therefore invalid under the general principle that an effective appeal divests the lower court of jurisdiction. Finally, the Fifth and Seventh Circuit cases cited by petitioner do not indicate that those courts would reach a different result from that of the court below.[4]

3. Petitioner's due process objections concerning the entry of the orders of June 25 and November 30 are also unfounded. Although the trial court's original discovery order was not initiated by the Secretary's filing of a formal written motion under Rule 37(a), Fed. R. Civ. P., petitioner had filed such a motion and both parties, as pointed out by the court below, had "call[ed] on the court for assistance" (Pet. App. 15). In these circumstances the requirements of notice were clearly met. Nor was the order defective because the Secretary did not file a motion to produce under Rule 34 (Pet. 10); the court's order providing that petitioner could produce his payroll records in lieu of answering the Secretary's interrogatories was added only to accommodate petitioner's claim that the interrogatories were burdensome. Finally, although,

[4] In *Turner* v. *HMH Publishing Co.*, 328 F.2d 136 (C.A. 5), the defendants filed simultaneously a motion to amend the judgment and a notice of appeal. The district court did not lose jurisdiction. *In re Federal Facilities Realty Trust*, 227 F.2d 651 (C.A. 7), involved a properly filed appeal, and held only that once a case is before the court of appeals, the district court has no jurisdiction to vacate a stay. In *Elgen Manufacturing Corporation* v. *Ventfabrics, Inc.*, 314 F.2d 440 (C.A. 7), a proper appeal was taken, but the court nevertheless concluded that the district court thereafter retained jurisdiction to consider a timely motion to amend the findings of fact.

due to a typographical error, the Secretary's motion for sanctions referred to Rule 37(b)(1) (which deals with depositions and thus is obviously not relevant), the Secretary's brief in support of the motion correctly referred to Rule 37(b)(2) (see A. 47–48). Petitioner's attorney appeared at the hearing and opposed the motion. The typographical error, therefore, was not prejudicial.

4. Petitioner's contention that an award of attorney's fees to the government violates due process is unsubstantiated by any judicial precedent. There is no constitutional requirement that all litigants in civil suits be afforded the same treatment in the matter of attorney's fees or other costs.[5] The rationale for not requiring the government to pay costs and fees is "the practical consideration that, since public moneys cannot be paid out except upon an appropriation by Congress, the Courts will not enter against the government a judgment for costs which would require the payment of moneys from the public treasury, unless they are expressly authorized by Congress to do so * * *" (*Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 95, 96 (C.A. 4)).

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[5] For example, in Section 16(b) actions under the Fair Labor Standards Act, employees who prevail are entitled to and must be awarded reasonable attorneys' fees (*Wright* v. *Carrigg*, 275 F.2d 448 (C.A. 4)) whereas employers in such actions have to pay their own attorney fees whether successful or not.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972